

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

**FILED**  
at \_\_\_ O'clock & \_\_\_ min. \_\_\_ M

**JUL 22 2011**

United States Bankruptcy Court  
Columbia, South Carolina (6)

IN RE:

C/A No. 11-02130-JW

Roger David Priester,

Chapter 13

**ORDER**

Debtor(s).

This matter comes before the Court on an Objection to Claim ("Objection") filed by Roger David Priester ("Debtor") to the claim of his former wife, Kathy Priester ("Ms. Priester"). Ms. Priester filed a response thereto. Ms. Priester filed a proof of claim on May 31, 2011, asserting a secured and priority claim for \$114,000 for a domestic support obligation. Debtor's Objection asserts that the \$114,000 claim is not a domestic support obligation and therefore should be treated as an unsecured, non-priority claim. After reviewing the pleadings and the arguments and evidence presented at the hearing, the Court makes the following Findings of Fact and Conclusions of Law.<sup>1</sup>

**FINDINGS OF FACT**

1. Debtor and Ms. Priester were married on August 4, 1984.
2. The parties separated in October of 2006 and were divorced by order of the Colleton County Family Court filed on June 17, 2008 ("Final Order"). Both parties testified at this hearing that the divorce was contentious.
3. Both parties were represented by counsel during the divorce proceeding.
4. The final divorce hearing was scheduled to be heard over the course of 3 days,

<sup>1</sup> To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

**ENTERED**

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beginning on June 3, 2008. However, the parties and counsel were able to reach a settlement agreement with regard to all matters raised by the pleadings. It appears the parties' agreement is reflected in the Final Order.

5. Per the Final Order, Debtor retained ownership of the parties' marital home on Castleberry Road and the commercial property on Savannah Highway (collectively, "Real Estate") and remained solely responsible for the associated debt. It appears substantial equity existed in the Real Estate, which would be subject to an equitable distribution.

6. The Final Order also states that Ms. Priester received the cash in her checking accounts of approximately \$38,000 and retirement accounts of approximately \$135,000.<sup>2</sup>

7. The issues presented at this hearing revolve primarily around the following paragraphs of the Final Order. Paragraph 3 states as follows:

As a balancing of the equities, the Defendant shall pay to the Plaintiff the sum of Two Hundred Ninety Thousand (\$290,000.00) Dollars which shall be paid as follows:

- a. One Hundred Fifty Thousand (\$150,000.00) Dollars to be paid immediately upon issuance of this Order;
- b. The balance of One Hundred Forty Thousand (\$140,000.00) to be paid in installments of One Thousand (\$1,000.00) Dollars per month for thirty six months commencing August 1, 2008, with the balance to be payable in a "balloon" payment at the end of the thirty-sixth month. Defendant may prepay this obligation at any time prior to the expiration of the thirty six months.

Paragraph 7 of the Final Order states the following:

The Defendant shall pay to the Plaintiff, as and for permanent, periodic alimony, the sum of Four Hundred (\$400.00) per month, commencing August 1, 2008. These payments shall be taxable to the Plaintiff and deductible by

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<sup>2</sup> It appears approximately \$80,000 of the funds in the retirement accounts was non-marital property and would not be subject to equitable distribution.

the Defendant and shall terminate upon the death of either party, the remarriage of the Plaintiff, or the cohabitation by the Plaintiff with another person, meeting the conditions set forth by alimony termination statute. Plaintiff shall keep Defendant apprised of her current home address for purpose of facilitation these payments for so long as Defendant is under an obligation to pay alimony.

8. Debtor filed a chapter 13 bankruptcy petition on March 31, 2011. At the time of filing, it appears Debtor had paid approximately \$176,000 of the \$290,000 obligation pursuant to paragraph 3 of the Final Order and was current on his \$400 per month alimony payments as described in paragraph 7 of the Final Order.

9. Ms. Priester filed a proof of claim on May 31, 2011 alleging that the \$114,000 balance remaining pursuant to paragraph 3 of the Final Order is a secured, priority claim and indicated that the claim is a domestic support obligation under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).<sup>3</sup>

10. Debtor's Objection asserts that the money owed pursuant to paragraph 3 is not a domestic support obligation as defined by § 101(14)(A) and therefore is not a priority debt. Further, no mortgage or other instrument secures the debt. Debtor argues the debt arose from a property settlement approved by the family court in the Final Order.

11. At the hearing, Debtor and Ms. Priester testified, as well as Clenton Campbell ("Mr. Campbell"), the attorney who represented Ms. Priester during the divorce proceeding, and Sabrina Grogan ("Ms. Grogan"), the attorney who represented Debtor during the divorce proceeding. Debtor also called Robert Papa as an expert witness in the area of state law domestic relations.<sup>4</sup>

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<sup>3</sup> Further references to the Bankruptcy Code shall be by section number only.

<sup>4</sup> Ms. Priester objected to Mr. Papa being offered as an expert witness. The Court overruled the objection on the grounds that Mr. Papa was qualified as an expert and noted that the joint statement of dispute

12. The parties stipulated that all requirements of § 101(14A) were met except for whether the obligation is “in the nature of alimony, maintenance, or support...of such spouse, former spouse...without regard to whether such debt is expressly so designated.” 11 U.S.C. § 101(14A)(B).

13. Both the parties and their respective divorce attorneys testified to allegations of marital misconduct, including adultery and substance abuse. However, the Final Order states that the divorce was granted on the ground of one year continuous separation.

14. The financial declarations that were submitted to the family court indicate that at the time of the divorce Debtor owned a heating and air company and made approximately \$6,800 per month. Ms. Priester was a school teacher earning approximately \$3,900 per month.

15. At the time of the bankruptcy hearing, Debtor continues to operate his heating and air company. However, after the divorce was final, Ms. Priester quit her job voluntarily and moved to New Mexico. She has since been unable to find an equivalent teaching position in New Mexico and is working 20 hours a week earning approximately \$9.00 per hour.

16. Debtor testified at length at the hearing. In his testimony, Debtor indicated that paragraph 3 of the Final Order was intended to equalize the property division since he received the Real Estate and that paragraph 3 was never intended as alimony. He testified that he agreed to pay \$400 per month in alimony as a way to end the settlement negotiations. Although the parties' 17 year old daughter never moved to New Mexico

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submitted by the parties clearly indicated that Mr. Papa would testify as an expert and no objection thereto was reserved.

with Ms. Priester, at the time of the divorce, Debtor believed that his daughter was moving, which factored into his agreement to pay alimony.

17. Robert Papa testified on behalf of Debtor as an expert witness. Mr. Papa had reviewed the Final Order and financial declarations of Debtor and Ms. Priester. He testified that the numbers supported a 50-50 marital property division of \$290,000. He also testified that many factors are considered when awarding alimony and, after considering the facts of this case, the range of alimony could be from zero to \$1400. In his opinion, the \$400 alimony award was a reasonable number given the income and education level of the parties.

18. According to Mr. Campbell's testimony, the \$150,000 paid to Ms. Priester pursuant to paragraph 3 of the Final Order was for a portion of her equity in the marital property. The remaining \$140,000 awarded in paragraph 3 was a blend of alimony and property settlement. However, Mr. Campbell testified that it would be difficult to determine what amount was alimony and what amount was a property settlement.

19. It appears from the testimony regarding negotiations and from the correspondence between the attorneys prior to the divorce that the range of Ms. Priester's portion of the equity in the marital property was between \$184,000 and \$390,000. Both attorneys appeared to agree that, by the time the case went to trial in 2008, the real estate market had declined and the values of the Real Estate had declined since the time the appraisals were completed.

20. Mr. Campbell testified that his client, Ms. Priester, intended to move to New

Mexico after the divorce and would need the \$150,000 for relocating and housing expenses. The remaining money awarded in paragraph 3 would be used, along with the \$400 per month alimony payments, to meet her living expenses.

21. Ms. Priester briefly testified to indicate that she agreed with the testimony presented by her domestic attorney, Mr. Campbell.

22. On the other hand, Ms. Grogan, counsel representing Debtor during the divorce, testified that she drafted the Final Order and used the phrase “balancing of equities” to refer to a property settlement and she did not intend to shift alimony to a property settlement and did not intend paragraph 3 to represent any form of alimony in this case.

### **CONCLUSIONS OF LAW**

Domestic support obligations as defined under § 101(14A) are entitled to full priority under § 507(a)(1)(A) and are non-dischargeable pursuant to §§ 1328(a)(2) and 523(a)(5). In a chapter 13 case, obligations such as a marital property settlement are not entitled to full priority and are dischargeable. The issue before the Court is whether the obligation described in paragraph 3 of the Final Order is in the nature of alimony, maintenance, or support or is one arising from a property settlement; the former being entitled to priority treatment, while the latter is merely a general unsecured claim.

When deciding whether a debt should be characterized as alimony, maintenance, or support, courts must consider whether the obligation was intended for support at the time of the divorce. In re Baker, 274 B.R. 176, 188 (Bankr. D.S.C. 2000); Tilley v. Jessee, 789 F.2d 1074, 1077 (4th Cir. 1986). When the claim arises from an agreement between the parties, the determining factor is the intent of the parties at the time the

agreement was reached. In re Sewell, 2008 WL 8130019 at \*2 (Bankr. E.D.N.C. 2008). In determining the parties' intention, courts must consider the terms of the agreement, but labels in the agreement are not controlling. Tilley v. Jessee, 789 F.2d at 1077. Also, courts must consider the overall circumstances of the parties, but "an examination of a written agreement [is] persuasive evidence of intent. Id. Thus, when the language of an agreement designates the type of payment, a substantial obstacle arises for the party opposing it. In re Bailey, 2010 WL 4622455 at \*3 (Bankr. N.D.W.Va. Nov. 4, 2010), citing Tilley v. Jessee, 789 F.2d at 1078.

Four non-exclusive factors often considered in determining whether an obligation is in the nature of alimony, maintenance, or support include: (1) the substance and language of the document in question; (2) the financial condition of the parties at the time of the decree of agreement; (3) the function served by the obligation and intent of the parties at the time of the agreement; and (4) whether there is evidence to question the intent of a spouse or evidence of overbearing by either party. Baker, 274 B.R. at 189 (citing In re Catron, 164 B.R. 912, 919 (E.D. Va. 1994); see also Breibert v. Breibert (In re Breibert), C/A No. 03-07440-W, Adv. Pro. No. 04-80195-W, slip op. at 8-9 (Mar. 22, 2005); In re Poole, 383 B.R. at 314. In addition, an obligation that is fixed and non-modifiable generally indicates a property settlement; however, this factor alone is not decisive. In re Flood, C/A No. 10-06063-JW, slip op. (Bankr. D.S.C. Nov. 8, 2010) (citing Kinder v. Kinder (In re Kinder), C/A No. 02-10519-W, Adv. Pro. No. 02-80342, slip op. at 4 (Bankr. D.S.C. Feb. 10, 2003)).

As an initial matter, the Court notes that the testimony of both divorce attorneys could be viewed as self-serving to some degree and it was no surprise that such testimony

defended the current positions of each party. The Court also observes that the procedure of utilizing the testimony of an attorney as an expert witness to offer an opinion so closely related to the ultimate legal issue to be decided by the Court is questionable. Therefore, the Court gives little weight to the expert testimony and testimony provided by each party's divorce attorney.

In this case, the Final Order represents an agreement by the parties where both sides were represented by counsel. The Court finds the Final Order is persuasive evidence of the parties' intent and the evidence presented at the hearing merely reinforces that paragraph 3 of the Final Order was intended as a property settlement. Paragraph 3 of the Final Order appears to be a fixed, non-modifiable obligation since the Final Order does not state that such obligation was related to, or in any way contingent on death or remarriage. Given that alimony was separately provided for in paragraph 7 of the Final Order, the intent of paragraph 3 appears to be solely to divide the marital property. This intent is further supported by the labeling of paragraph 3 as a "balancing of the equities."

It appears undisputed from the testimony and evidence presented that Ms. Priester's equity in the marital property ranged from \$184,000 to \$390,000. It also appears undisputed that the economic climate at the time of the Final Order had caused a decrease in the value of the Real Estate. Therefore, it does not seem unreasonable to conclude that the parties settled on \$290,000 as Ms. Priester's half of the equity in the marital property.<sup>5</sup> The Court concludes that the function served by paragraph 3 was to do

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<sup>5</sup> Debtor objected to exhibit 6, a summary appraisal of the marital home, being entered into evidence because Debtor disagreed with the value asserted in the appraisal. The Court took the objection under advisement. The Court hereby overrules Debtor's objection to exhibit 6 and finds that all of the testimony presented indicated the same range of value for the equity in the Real Estate. The Court also notes that the parties submitted a joint statement of dispute and neither party reserved or indicated in any way that there may be objections to any of the exhibits or testimony outlined in the joint statement.



exactly what the label suggests: balance the equities in the division of marital property. In addition, no evidence presented to the Court suggests that paragraph 3 was the result of overbearing conduct by either party.

Mr. Campbell testified that the intent of the \$140,000 awarded in paragraph 3, which is to be paid in installments of \$1,000 per month, was to provide for daily living expenses. However, no language in the Final Order reflects this intent. Ms. Priester's argument is based upon her income being less than Debtor's at the time of divorce and her alleged need for support to move to New Mexico. However, there must be mutual intent of the parties to treat an obligation as being in the nature of alimony, maintenance or support. See In re Bailey, 2010 WL 4622455 at \*3 (Bankr. N.D.W.Va. 2010) (citing Tilley, 789 F.2d at 1077)). Debtor and his attorney did not agree that this was the intent of the parties. While there was an income disparity between the parties at the time of the divorce, the Final Order expressly provided monthly alimony in paragraph 7 to account for this disparity. The Court does not find it plausible that Debtor intended to be responsible for additional alimony in paragraph 3 to support Ms. Priester financially for her decision to voluntarily resign from her job and move to another state.<sup>6</sup> The better explanation is that the parties intended paragraph 3 to be a division of the marital property and paragraph 7 was intended to provide alimony to Ms. Priester. While any financial award to Ms. Priester would improve her financial condition, it does not appear from a review of the Final Order or the weight of the evidence presented at the hearing that paragraph 3 was intended by the parties to be support.

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<sup>6</sup> It appears on some occasions family court attorneys may mislabel alimony as a means of avoiding the tax consequences associated with such payments. Without supporting documents to substantiate this intent, the Court is not convinced that such a result was intended in this case. Nevertheless, the Court observes that a practice of mislabeling can lead to further disputes between the parties as indicated in this case.

Based on the foregoing, the Court finds the award of \$290,000 in paragraph 3 of the final order was not intended to be in the nature of alimony, maintenance or support. Therefore, it is ordered that the Objection is sustained and the proof of claim filed by Ms. Priester in the amount of \$114,000 may be treated as an unsecured, non-priority claim.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
July 22, 2011